No. 01-45

In the

Supreme Court of the United States

GARY MAZZA,

Petitioner,

v.

WILLIAM BRATTON, as Commissioner of the New York City Police Department et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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August 10, 2001

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Whether an employer is required under the Americans With Disabilities Act to provide a leave of absence for an indeterminate period of time as an accommodation for an employee whose medical condition prevents him from coming to work at all and who cannot predict, after nine months of leave, when he will be able to return to work?

2. Whether an employee must make a request for a reasonable accommodation before complaining that the employer has failed to provide such an accommodation under provisions of the Americans With Disabilities Act?

LIST OF PARTIES

Petitioner

The petitioner, Gary Mazza, has no corporate affiliations.

Respondents

The respondents are: William Bratton, as Commissioner of the New York City Police Department; Raymond P. Kelly, as Commissioner of the New York City Police Department; Lee P. Brown, as Commissioner of the New York City Police Department; The New York City Police Department and The Police Pension Fund Article II of The New York City Police Department.

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The Opinion and Order of the United States District Court for the Eastern District of New York is published at 108 F.Supp. 2d 167 (E.D.N.Y. 2000), and is also reproduced in the Appendix to the Petition for Writ of Certiorari at pages 4a-25a.

The Summary Order of the United States Court of Appeals for the Second Circuit is unreported and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages 1a-3a.

COUNTER STATEMENT OF THE CASE

Petitioner Gary Mazza was appointed to the New York City Police Department ("NYPD") in October, 1990. After completing his training at the Police Academy in April 1991, he was assigned to regular police duties at the 122nd Precinct for his two-year probationary period. Probationary terms are automatically extended by the number of days an officer is out on sick leave. Because of his long sick leave (May 1992-February 1993), at the time of his discharge on February 25, 1993, Mazza was still a probationer.

In April 1992, Mazza began suffering diarrhea and bloody stool. On May 2, 1992, he collapsed and was hospitalized and treated for what was diagnosed as severe ulcerative colitis. In the next six weeks, he was re-hospitalized for a total of 30 days, and as of his hospital discharge on June 14, 1992, took full-time paid sick leave.

Under terms of the NYPD's sick leave policy, Mazza was required to make periodic visits to the NYPD medical office for examinations by a District Surgeon. Mazza was seen at various times by Dr. Stanley Edelman and Dr. Leah Dann. Unknown to the doctors, Mazza secretly tape-recorded at least some of his discussions with them. He later produced copies of these tapes to defendants during discovery in the ensuring lawsuit.

After five examinations (June 29, July 10, July 24, Aug. 18, and Aug. 28, 1992), Dr. Edelman noted that, despite attempts to treat his condition with a variety of medications, including steroids and anti-cancer drugs, Mazza was still suffering "a very serious debilitating case of ulcerative colitis" with complications that "would eventually require major colon surgery." He felt at that time that Mazza's future as a full-duty police officer was "in serious doubt."

However, at that time the Department continued Mazza on paid sick leave. In his EEOC Complaint, Mazza stated that in October, 1992, he asked Dr. Edelman "for an accommodation because I felt I was qualified to work. I was not allowed to report to active duty because I was on medication." He never identified the person he asked or the date. At his deposition (Aug. 14, 1996), he testified that the type of accommodation he wanted was a position that was close to a bathroom; he claimed at his deposition that he could have handled full patrol duty with that accommodation.

The tape recording of Mazza's discussion with Dr. Edelman on October 16, 1992 appears to contradict this statement. In the recording, Mazza is heard saying that "nothing has changed" and he has to go into the hospital again because "something really frightening [is] going on with the medication...and I'm just not feeling right." Dr. Edelman says:

> "There's nothing to worry about. Now I know you got a problem, and I know you're on heavy medication. But why can't you go...and do something for the Police Department? You've been out of work already...six months you've been out, right? If you could travel here, you could travel to a precinct....so you sit at a desk and answer a phone, but do something!"

Mazza responds that he has to consult his private doctor first, to straighten out the medication "because I'm feeling really lousy" and he won't see the doctor for two weeks. Edelman says: "I don't know why you're not able to – sit at a desk and answer a telephone." Mazza replies: "It's pretty obvious." Edelman responds: "No, it isn't obvious." Nowhere on any

tape provided by Mazza does he ask to return to work, nor is he told that he cannot return because he is on medication.

At his deposition (Nov. 6, 1996), Dr. Edelman did not recall the Oct. 16, 1992 conversation; he did testify that at no time prior to his termination did Mazza ever affirmatively state that he was able to return to work. Dr. Edelman further testified that if the colitis had been under control with medication, Mazza would have been capable of doing clerical work. However, Mazza testified at his deposition that he was still experiencing the symptoms of colitis, which included nausea, cramps, gas, bowel urgency, and fatigue, "right up to the end of 1992."

Mazza also stated, in his affidavit opposing summary judgment, that on Nov. 20, 1992, his father had talked to Dr. Edelman, who told him that the NYPD was going to return Mazza to duty, possibly at the precinct nearest his home, "next week." However, Mazza did not return to work.

On December 9, 1992, Dr. Edelman wrote to Dr. Dann to ask her to write up a termination recommendation on Mazza; she did so. She stated that he had "active inflammatory bowel disease...a biopsy proven IBD...cramps and bloody diarrhea (6-8 times/day)...currently on corticosteroids and 6-mercaptopurine." She recommended termination "in view of his continued disease activity, with no possibility to be restored to full duty in the near future and more than seven (7) months of being on sick report."

After discussions with Dr. Edelman on the case, NYPD Chief Surgeon Dr. Robert E. Thomas endorsed the termination recommendation, noting on Dec. 28, 1992, that, despite the use of strong medication, with potential serious side effects, since May 1992, Mazza's "disease is still not in remission."

On January 6, 1993, Mazza submitted a note from his private physician, Dr. Prasanna C. Wickremesinghe, which stated: "This patient is still in intensive therapy for Chronic Universal Ulcerative Colitis. Should he respond favorably, he will be able to resume his previous duties with some accommodations." Mazza testified at his deposition that he understood the note to mean that he could return to work, that the doctor would not have given it to him otherwise. However, he testified that his disease did not actually go into remission until around the end of February, 1993, when he began to respond to the medication.

In the meantime, the termination recommendation was making its way up the chain of command to the Police Commissioner, who authorized it as of Feb. 1, 1993. On February 25, 1993, Mazza was notified that his services as a Probationary Police Officer were terminated.

In June, 1993, Mazza filed a complaint with the EEOC alleging discrimination under the Americans With Disabilities Act ("ADA"). The EEOC's determination, dated Aug. 4, 1994, held that there was no violation, because although Mazza had a disability, he was not a "qualified individual" since he could not perform police duties, with or without accommodation.

Mazza filed this action on October 29, 1994. After discovery, on September 30, 1999, defendants moved for summary judgment, which was granted by the United States District Court for the Eastern District of New York (Gershon, J.) in an opinion and order dated Aug. 3, 2000. See, Opinion and Order reproduced in the Appendix to the Petition for Writ of Certiorari, pp. 4a-25a.

Judge Gershon carefully reviewed the facts in evidence as presented in the Record on Appeal, and determined that (a) Mazza did have a disability that substantially limited him in a

major life activity, or in the alternative, that the NYPD regarded him as having such a disability; (b) he had not shown sufficient evidence to create a triable issue of fact that he was able to perform the essential functions of his position, with or without accommodation, because he could not show that he could get to his workplace to do any type of work even after eight months of treatment while on sick leave; even his own doctor's note of January 1993 said merely that "if he responded favorably to intensive medical therapy" he could return to work; in the Court's opinion, this note "necessarily confirmed the evaluation of NYPD physicians that plaintiff's prognosis was poor" (21a); and (c) he had not presented evidence that created any genuine issue of fact that he had requested an accommodation, and that the tape-recorded conversation of Oct. 16, 1992 with Dr. Edelman "completely undermines his position" (24a). Therefore, Judge Gershon found:

> Having continued plaintiff on sick leave for almost ten months with no request by plaintiff to return to work in any capacity, without any indication from plaintiff that he could resume his duties soon, and having been presented with evidence of plaintiff's serious medical condition and no evidence that it had improved or was expected to improve imminently, defendant did not engage in unlawful discrimination when it discharged plaintiff (24a).

By Summary Order filed April 11, 2001, the United States Court of Appeals for the Second Circuit affirmed the order "substantially for the reasons stated in Judge Gershon's Opinion and Order dated August 3, 2000" (3a).

REASONS FOR DENYING THE WRIT

1. **The Circuits Are Not Split on the Legal Principles Applicable to A Disability Act Plaintiff's Burden to Show That He Was Able to Perform His Essential Duties, Including Showing Up At Work, With or Without A Reasonable Accommodation; Petitioner Simply Failed to Make The Necessary Factual Showing.**

To make a prima facie case under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq., a plaintiff must show that even though he has a disability, he is a "qualified individual" who could perform the essential functions of his job, with or without a reasonable accommodation; 42 U.S.C. § 12111(8). On this element, the plaintiff has the burden of proof. See, e.g., Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29, 33 (1st Cir. 2000); Parker v. Sony Pictures Entertainment Inc., 204 F.3d 326, 332 (2d Cir. 2000); Nicosia v. Yellow Freight System, Inc., 253 F.3d 943 (7th Cir. 2001).

Petitioner failed to make that showing to the satisfaction of the District Court or the Court of Appeals below. In order to create the appearance of conflict among the Circuits for purposes of this Petition, he over-simplifies the applicable principles and states them as per se rules, which they are not. Rather, the two "questions" he presents – whether a leave of absence can constitute a reasonable accommodation, and whether regular attendance at work is an essential job requirement – are both fact-specific inquiries that vary with the circumstances. The different holdings of cases in different Circuits are explained by the different fact-patterns in those cases, not by a difference on the legal standards to apply. There is no conflict requiring resolution

by this Court, and the courts below were correct in their analysis and conclusions under the applicable law.

A. When Is Regular Attendance at Work Essential?

While the cases vary in the wording when they their assert that showing up to do the job is an essential element, they all acknowledge that application of this principle depends on the circumstances of the particular job. For example, in Tyndall v. National Education Centers Inc., 31 F.3d 209, 213 (4th Cir. 1994), which uses strong language in stating: "In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis," the Fourth Circuit also notes that this principle does not necessarily apply if the person can do the job fully from home. Carr v. Reno, 23 F.3d 525, 530 (D.C.Cir. 1994) limits its assertion that "ability to appear for work" is essential, to "any government job." And Jackson v. Dep't. of Veterans Administration, 22 F.3d 277, 278-79 (11th Cir. 1994), cert. dismissed, 513 U.S. 1052 (1994), like the great majority of cases discussing this principle, explicitly states that regular attendance at work is essential because of particular features of the job in question. And see, Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1187-89 (6th Cir. 1996) (regular attendance was essential to customer service job since there was only one such position in the company), Tobias v. Arizona Board of Regents, 1998 U.S. App. LEXIS 30070 (9th Cir. 1998) (attendance at staff meetings was essential part of supervisor's job); Ward, supra (though the court was "inclined to presume that regular and reliable attendance is essential to any job," that presumption did not apply under facts of the case where data-entry clerk could perform his work on a scheduled with irregular hours).

Petitioner unwittingly acknowledges this fact in his quotation from Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998) on the point that to presume that regular attendance is essential would go against the need to make an "individualized" assessment of each situation. In Cehrs, as in the other case petitioner cites as creating a conflict on the "attendance is essential" point, Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998), the nature of the plaintiffs' jobs permitted short temporary absences so that, for them, ability to appear for work at all times was not an essential aspect of the job. Thus, there is no conflict among the Circuits on this legal principle, only a difference of results depending on the facts of each case.

In this case, the courts below took into account the uncontested facts that petitioner was a government employee, a police officer, and concluded that for this job, the ability to appear at the workplace and perform work was essential; see, Carr, supra; Querry v. Messar, 14 F.Supp.2d 437, 444 (S.D.N.Y. 1998) (plaintiff was not "otherwise qualified" for her job as a police officer "because she could not perform one of the essential functions of her job - regularly attending work").

B. When Can Leave Be a Reasonable Accommodation?

Similarly, there is no conflict among the Circuits on the legal principles governing whether any particular proposed accommodation is reasonable for a particular disability in a particular job – again, it is a case by case determination. Therefore, petitioner's citations to various Circuits for their language to the effect that a medical leave or an extended leave are reasonable accommodations fails to acknowledge that those courts came to their conclusions in the particular circumstances of each case, rather than as a per se rule of law. Again, one of petitioner's own cited cases, Norris v. Allied-Sysco Food Services Inc., 948 F. Supp.

1418, 1439 (N.D. Cal. 1996), aff'd. without discussion of this point, 191 F.3d 1043 (9th Cir. 1999), cert. den., 528 U.S. 1182 (2000), makes this very point. Norris cited a long list of cases in which a lengthy leave of indefinite duration was found to be unreasonable, but concluded that a per se rule was not appropriate because each case requires analysis of its specific circumstances.

Further, the result advocated by petitioner here - that a further indefinite extension of his eight-month indefinite leave of absence should have been required as a reasonable accommodation - is refuted by cases with similar factual circumstances, from many Circuits. Indeed, the cases with such facts support the result reached by the District Court and affirmed by the Court of Appeals here.

The longer the time a plaintiff was on leave from the job on account of a disability, and the more indeterminate a plaintiff was as to how much more recovery time would be needed, the more likely it is that a court will hold that further extension of a medical leave is not a "reasonable accommodation" as a matter of law. See, e.g., Dudley v. California Dep't. of Transportation, 2000 U.S.App. LEXIS 5249 (9th Cir. 2000) (diabetic supervisor was unable to demonstrate that "any defined period of leave would have allowed her to control her condition" so dismissal after seven months' leave was not discriminatory); Monette, supra, 90 F.3d at 1187, stating: "employers are under no duty to keep employees on unpaid leave indefinitely" (where employee was discharged after being was out eight months); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1226 (11th Cir. 1997) (where employee was discharged when his doctor could not clear him to return to work after ten months' treatment for high blood pressure, a further extension of leave was not a required accommodation, even though employer had a paid leave program that could have been extended up to a year);

Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) (where diabetic bus driver sought extended leave to get his condition under control, held: "Nothing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect:" Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990) (reasonable accommodation does not include any duty to await uncertain results of alcoholic employee's treatment program).[1]

Petitioner's other citations are not to the contrary, since each turns on facts quite different from those here. Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989) turned on a sequence of treatment options for alcoholics that is required of the military services before a discharge is permitted; petitioner here is neither an alcoholic nor discharged from the military. Kimbro

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[1] The law is also clear that whether an employee is able to perform the essential functions of the job must be determined on the basis of the facts as of the date the termination decision was made, not any facts that occur thereafter. E.g., Myers v.Hose, 50 F.3d at 283, stating that the ADA regulations "contain no reference to an individual's future ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as whether an individual "can" (not "will be able to") perform the job with reasonable accommodation." Thus there is no probative value to the coincidence that Mazza's condition finally began to respond to medication shortly after the beginning of February, when the Police Commissioner signed off on the termination recommendation, which had been submitted early in December, well before any improvement was either apparent or foreseeable, and was not rebutted, but was actually supported, by the doctor's note submitted by Mazza in January.

v. Atlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989), cert. den., 498 U.S. 814 (1990), noted that an extended leave would have been reasonable because its plaintiff had shown in previous episodes of migrane attacks that he was likely to recover in only a few months, and in Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601 (7th Cir. 1998), the employee had requested only a short-term leave and her doctor stated that he believed 2-4 weeks would be enough to get her through her lupus flare-up. Here, after seven months, petitioner's doctors were unable to forecast when or whether his condition might improve; indeed, there was continued discussion of a potential need for major surgery in addition to medication if his condition did not improve; the end of his leave period was nowhere in sight. Jankowski Lee & Assocs v. Cisneros, 91 F.3d 891 (7th Cir. 1996) did not involve a request for a leave but for a parking space, and is completely inapposite in that respect.

There are no conflicting rulings of law for this Court to review any under these facts, and the cases most closely corresponding to the facts here support the result reached by the courts below.

II. There Is No Conflict Among The Circuits Over The Principle That the Employee Must Request A Reasonable Accommodation Before Claiming That One Was Denied.

Petitioner argues that the Circuits are split over whether or not the employee has a duty to request a reasonable accommodation before claiming a failure of such accommodation. He cites cases from the First, Sixth, Seventh, and Ninth Circuits for the proposition that the duty to accommodate attaches as soon as an employer knows that an employee has a disability, and claims that this creates a conflict of legal authorities between those and cases (none cited) from other Circuits which hold differently.

In fact, the cited cases do not state such a hard and fast rule, and also, other more recent cases from those same Circuits actually state the rule that was applied here: that an employer cannot be liable for a failure to provide an accommodation if the employee has not requested or proposed one. Thus, there is no split in the Circuits on that proposition.

See, e.g., Watkins v. J&S Oil Co., 164 F.3d 55, 62 (1st Cir. 1998), which flatly states that "under the ADA, Watkins was obligated to request a reasonable accommodation;" Brown v. Chase Brass & Copper, 2001 U.S. App. LEXIS 15726 (6th Cir. July 10, 2001), citing Monette, supra, which held that the "disabled individual bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable;"[2] Jovanovic v. In-Sink-Erator Division, 201 F.3d 894 (7th Cir. 2000), also points out that "we believe that the standard rule is that a plaintiff must normally request an accommodation before liability under the ADA attaches," citing Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1218 (8th Cir.) cert. denied, 528 U.S. 821 (1999)("Only [the employee] could accurately identify the need for accommodations specific to her job and workplace"); and Brown v. Lucky Stores Inc., 246 F.3d 1182, 1188 (9th Cir. 2001), denying plaintiff's ADA claim specifically because she had not requested any accommodation. These holdings are in line with those in several other Circuits that have considered this issue; e.g., Taylor v. Principal Financial Group, Inc., 93 F.3d 155 (5th Cir.), cert. den., 519 U.S. 1029 (1996)(ambiguous requests do not meet this standard); Hatchett v. Philander Smith College, 251 F.3d 670 (8th Cir. 2001); Gaston v. Bellingrath Gardens, 167 F.3d 1361 (11th Cir. 1999).

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[2] Plaintiff's Sixth Circuit citation on this point, Cehrs, supra, actually accepts this rule, saying simply that the "employee's initial burden of articulating a reasonable accommodation need not be onerous."

As the Ninth Circuit explained Lucky Stores, supra, there is an exception to that rule only where the employer knows that the disability itself has prevented the employee from making the request. That was the rationale relied on in the Seventh Circuit case cited by petitioner, Bultemeyer v. Forth Wayne Community School, 100 F.3d 1281 (7th Cir. 1996), which involved a mentally-ill custodian who was unable to explain the accommodation he needed, thus triggering the employer's duty to engage in an interactive process of inquiry. Similarly, in petitioner's First Circuit case, Criado, supra, the plaintiff had a "mental impairment" and did not communicate directly with her employer at all, so her doctor's communications should have been regarded as sufficient request for accommodation. In Schmidt v. Safeway Inc., 864 F.Supp. 991 (D.Ore. 1994), the plaintiff had an alcohol problem. Here, of course, petitioner's colitis is not the type of disability that prevents him from articulating a request for accommodation, so this exception to the general rule does not apply.[3]

Petitioner's problem in this case is that, as the District Court found and the Second Circuit affirmed, he failed to present evidence that would raise a genuine factual issue as to whether he actually requested an accommodation that would make it possible for him to return to work and perform the

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[3] Petitioner's other citations do not actually discuss the rule; in Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998), a class action, the plaintiffs had in fact made a request for reassignment and the issue was whether the company's alternative accommodations were sufficient; in Kimbro, supra, the issue was whether the employer could be charged with knowledge possessed by plaintiff's supervisor about the nature and extent of plaintiff's disability.

essential functions of his job.[4] Rather, the evidence tends to show that he simply stayed out on sick leave and even when offered the chance to return to limited desk duty, he rejected it, saying he was not yet ready to return to work.

Whether or not a longer leave would have been an appropriate accommodation, as Mazza now belatedly suggests (and under the circumstances here, where there was no indication how long it would take him to recover, it could not reasonably be required; see (a) above), his failure to submit evidence of any request for such an accommodation while he was still employed justified summary judgment for defendants. The Circuits are united in holding that under the circumstances present here, the employee must propose an appropriate accommodation. On this point, the Second Circuit was correct here, and there is no legal issue dividing the Circuits for this Court to resolve.

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[4] He certainly never asked the Police Department for an accommodation in the form of an extended leave of absence. It is only in his legal papers that he now asserts that the Police Department should have offered him a still-longer sick leave as a form of accommodation, to let him recover enough to perform full duty. Clearly it is not permissible for an employee to refrain from proposing a particular accommodation until after he has been discharged, and then, in his legal papers, to complain that the employer did not offer that choice of appropriate accommodation. Webster v. Methodist Occupational Health Centers Inc., 141 F.3d 1236, 1238 (7th Cir. 1998).

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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